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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 118

JOSEPH BEAUHARNAIS,
Petitioner,

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

PETITION FOR REHEARING

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Dated: New York, N. Y., May 9, 1952.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Joseph Beauharnais, respectfully petitions for a rehearing of the decision of this Court in this case on April 28, 1952, which affirmed petitioner's conviction for violation of Section 224a of Division 1 of the Illinois Penal Code.

This petition requests a rehearing solely on the holding of this Court that, "Libellous utterances, not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the State courts, to consider the issues behind the phrase 'clear and present danger.'" P. 16, Slipsheet Opinion. (All page references hereinafter are to the Slipsheet Opinion unless otherwise indicated.)

We do not ask for a rehearing on this Court's decision that the standards laid down by the statute are sufficiently

definite to meet the constitutional requirements of the due process clause of the Fourteenth Amendment. This question was presented to the Court by the parties' briefs, was argued thoroughly at the oral argument; though the decision held against us, we would deem a rehearing on this point inappropriate. However, the contention that utterances libelling groups are not within the area of constitutionally protected speech was not pressed on the Court in briefs or in oral argument. We suggest that a rehearing is appropriate under such circumstances, particularly when as here, the holding is not merely a reaffirmation or new application of a prior holding, but is completely novel. We suggest that a rehearing is particularly appropriate here because, although this holding of this Court is supportable by older *dicta,* there is other and later *dicta* which is *contra,* and because the decision of this Court has impliedly overruled prior decisions of this Court in at least three major cases, and has overruled this Court's express decision in another major case.

POINT I

The Court decided that utterances libelling groups were not within the area of constitutionally protected speech, though this proposition had never been pressed upon it, and though the point was a novel one never before decided by this Court.

(A) Decision on an issue of such momentous implications not pressed before the Court should not be made without full argument.

(1) This question was never pressed before the Court.

Petitioner's brief took the position that the contents of petitioner's diatribe were constitutionally protected.

Respondent denied this only formally in two short paragraphs without citation of a single case in point (Respondent's Brief, p. 4). Counsel recollects that this proposition of law was not denied by Illinois on the oral argument, nor did any of the Justices of this Court take petitioner's counsel to task for having alleged this proposition. See *Arguments before the (Supreme) Court*, 20 U. S. Law Week 3141 ff. The Supreme Court of Illinois indeed had held that the clear and present danger was applicable (R. 39-40).[1]

The Court thus decided a question not argued before it. We need look no further than the opinion in this case for authority that this Court should not decide questions not pressed upon it by the parties. This Court stated on page 14:

> "Neither by proffer of evidence, requests for instructions, motion before or after verdict did the defendant seek to justify his utterance as 'fair comment' or as privileged. Nor has the defendant urged as a ground for reversing his conviction in this Court that his opportunity to make those defenses was denied below. And so, whether a prosecution for libel of a racial or religious group is unconstitutionally invalid where the State did deny the defendant such opportunities is not before us."

Three of the Justices of the Court who subscribe to the majority opinion in the case at bar (Mr. Chief Justice Vinson, Mr. Justice Frankfurter, and Mr. Justice Burton) vigorously contended in *Terminiello* that a decision of

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[1] Our contentions were that (1) the test was improperly applied (2) in the absence of a finding by the trial court or jury of the existence of a clear and present danger.

this Court on the basis of points not raised before it in any stage of the proceedings nor raised below was improper. *Terminiello* v. *City of Chicago*, 337 U. S. 1 (1949).

(2) The question thus decided without argument is a monumental one.

This decision sustains the constitutionality of all state criminal libel laws, individual and group, in the absence of a clear and present danger.[2] All this without a hearing having been had on this issue, and without any prior holding by the Court to this effect. Counsel for petitioner share the fears of Mr. Justice Black and Mr. Justice Douglas that a weapon has now been given to enemies of minority groups. Without a requirement of a finding of a clear and present danger there is no way in which this Court could ever overturn a conviction for criminal libel in any of the instances set forth on page 8 of Mr. Justice Black's opinion and page 3 of Mr. Justice Douglas' opinion.

The majority was careful to point out that it would not decide the issue of constitutionality of outlawry of libels of political parties. But of course, political parties are not exempt from being prosecuted under the Illinois group libel law here sustained. Thus political advocacy might be restricted even under this decision. If libellous utterances are not within the area of constitutionally protected speech as this Court holds, one may inquire whether *any* free speech question would be raised if libel of political parties were outlawed. While this Court points out that in such a situation "the whole doctrine of fair comment as indispensable to the democratic political process would come into play" (p. 13, fn. 18), this Court also pointed

[2] A group libel law has been introduced into the House of Representatives since this Court's decision in this case.

out that the defense of fair comment was protected by the Illinois law here (p. 14, fn. 19). Thus the one distinction suggested by the Court is an irrelevant one. Certainly "the whole doctrine of fair comment as indispensable to the democratic political process" is involved in this statute since it penalizes utterances even when made by political parties. We can see no basis upon which this Court could later hold constitutional a law outlawing libels of political parties unless it were to do so on the due process ground that it would be "a wilful and purposeless restriction unrelated to the peace and well-being of the State" (p. 8). In view of the long history of political conflict in the state of Illinois, we find it difficult to comprehend how this Court could upset such a statute of Illinois if it came before it. We point out that Illinois conceded on the oral argument that if this statute would be upheld, a statute outlawing libels of political parties would also have to be held constitutional.[3]

(B) The decision on this point is the first holding of this Court on this issue; while supportable by *dicta* it is directly contrary to a more recent holding by this Court and impliedly overruled three major recent decisions.

We do not deny that *dicta* exist to the effect that libellous words—directed against an individual—can be criminally punished without raising a constitutional problem.[4]

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[3] In this connection it is interesting to note that while Illinois was asked by Mr. Justice Black to include, in its memorandum on labor and racial violence in Illinois, the record of political riots (20 U. S. Law Week 3143, col. 2), no such record was included.

[4] As this Court stated, it has also been stated in *dictum* that obscenity is exempted from constitutional protection. But this Court was in error when it stated that "Certainly no one would contend that obscene speech * * * may be punished only upon a showing of such circumstances. (of clear and present danger)." P. 16. For it was squarely held by Judge Curtis Bok that obscenity could not be

However, the most recent *dicta* on the subject are directly *contra*. Thus, in *American Communications Assn.* v. *Douds*, 339 U. S. 382, at 412, Mr. Chief Justice Vinson stated that an individual is "permitted to advocate *what he will*" (emphasis supplied) in the absence of the existence of a clear and present danger, and this Court in *Dennis* v. *U. S.*, 340 U. S. 494 at 510, adopted the rule as laid down below that "*In each case* [courts] must ask whether the gravity of the 'evil', discounted by its improbability, justified such invasion of free speech as is necessary to avoid the dangers." (Emphasis supplied.) While agreeing with the majority in *Dennis* holding that advocacy of revolution is constitutionally protected, we wonder upon what rationale such speech is protected by constitutional guarantees whereas libellous statements of groups are not.

Moreover, the decision in this case is directly *contra* to this Court's decision in *Cantwell* v. *Connecticut*, 310

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punished except upon a showing of such circumstances. *Commonwealth* v. *Gordon*, 66 Pa. Dist. & Co. R. 101 (1949). This test was expressly approved and Judge Bok's decision upheld by the Superior Court of Pennsylvania *sub nom.* *Commonwealth* v. *Feigenbaum*, 166 Pa. Super. 120, 70 A. 2d 389. The Supreme Court of Pennsylvania denied leave to appeal in an unreported *per curiam* order on March 30, 1950, which read as follows: "Allocatur refused, without, however, approving the test of 'clear and present danger' as applied to alleged obscene literature adopted by Judge Bok in the Quarter Sessions and apparently approved by the Superior Court." It should be noted that the Court did not disapprove of the test.

In addition, it was contended before this Court in a brief of the American Civil Liberties Union as *amicus curiae* in *Doubleday and Co., Inc.* v. *New York*, No. 11, October Term 1948, that obscene speech could not be punished except upon a showing of such circumstances. Whether this Court ever ruled upon this contention is impossible to say, for the decision below was affirmed by an equally divided Court without opinion. *Doubleday & Co., Inc.* v. *New York*, 335 U. S. 848. Of course, the question of the limitation of obscenity by the clear and present danger test need not be decided in this case in any event.

U. S. 296, holding that language denouncing the Roman Catholic Church as "an instrument of Satan" was protected by the First Amendment. Said this Court at page 310,

> "In the realm of religious faith, and that of political belief, sharp differences arise. In both fields the tenets of one may seem the rankest error to his neighbor. *To persuade others to his own point of view the pleader, as we know, at times, resorts* to exaggeration, *to vilification* * * *, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.*" (Emphasis supplied.)

In *Douglas* v. *City of Jeanette*, 319 U. S. 157 (1943), the constitutional guarantee of free speech was held to apply to a description of the Roman Catholic Church organization as a "harlot".

In *Kunz* v. *N. Y.*, 340 U. S. 290, this Court held that the guarantee of the First Amendment applied to an address delivered on the streets of New York vilifying Jews as "Christ-Killers."

In *Terminiello* v. *City of Chicago*, 337 U. S. 1 (1949), this Court held the constitutional guarantee of free speech applicable to language much more libellous of racial and religious groups than the language in question here. For example, as quoted from the dissenting opinion of Mr. Justice Jackson, Terminiello stated, "I said, 'Fellow *Christians*' and I suppose there are *some of the scum got in by mistake*, * * * the *slimy scum.*" He accused the Jews of wanting to inject syphilis and other diseases into non-Christians. Jews were called Communistic.

at 17, 20. This Court held this speech to be within the protection of the First Amendment.

Thus the Court has on these four occasions held words libellous of racial and religious groups to be protected by the First and Fourteenth Amendments. It never held nor stated otherwise. Whatever the *dicta* of this Court on the constitutionality of criminal libel laws directed against libels of individuals, this Court never before passed upon whether criminal libel laws directed against members of groups are constitutional, but in each of the cases listed above—in *Cantwell,* in *Kunz,* in *Douglas,* in *Terminiello*—it consistently upheld the constitutional protection of free speech for words libellous of racial and religious groups, whatever the form of the statute under which the case arose.[5] The decision in the instant case thus necessarily overrules each of the four mentioned above. We submit that irrespective of whether or not such an overruling is now justified, it should not be done without any argument on the issue having been presented to the Court. We submit that a rehearing is most certainly necessary in this case.

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[5] The Court analogized the prevention of libellous utterances to that of obscene speech. We submit that the analogy is without foundation. Obscenity never touches upon the political or social issues of the day. *But group libel most certainly does.* Comments such as Beauharnais engaged in were, while thoroughly repulsive to the members of this Court and to all counsel involved in the case before it, none the less comments on the burning political and social issues of the day. The same cannot be said for obscenity.

CONCLUSION

This petition for a rehearing should be granted and the judgment below reversed.

Dated: New York, New York
May 9, 1952.

Respectfully submitted,

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Certificate of Counsel

ALFRED A. ALBERT, THURGOOD MARSHALL and HERBERT MONTE LEVY, counsel for petitioner in this case, hereby certify that this petition for rehearing is presented in good faith and not for delay.

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